



[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9801]

RIN 1545-BM46

Issue Price Definition for Tax-Exempt Bonds

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations on the definition of issue price for purposes of the arbitrage investment restrictions that apply to tax-exempt bonds and other tax-advantaged bonds. These final regulations affect State and local governments that issue tax-exempt bonds and other tax-advantaged bonds.

DATES: Effective date: These regulations are effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Applicability date: For the date of applicability, see §1.148-11(m).

FOR FURTHER INFORMATION CONTACT: Lewis Bell at (202) 317-6980 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-

1347. The collection of information in these final regulations is in §1.148-1(f)(2)(ii), which requires the underwriter to provide to the issuer a certification and reasonable supporting documentation for use of the initial offering price to the public, §1.148-1(f)(2)(iii), which requires the issuer to obtain a certification from the underwriter for competitive sales, and §1.148-1(f)(2)(iv), which requires the issuer to identify in its books and records the rule used to determine the issue price of the bonds. The respondents are issuers of tax-exempt bonds that want to apply the special rules in §1.148-1(f)(2) to determine the issue price of the bonds.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally tax returns and tax return information are confidential, as required by section 6103.

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) on the arbitrage investment restrictions under section 148 of the Internal Revenue Code (Code). On June 18, 1993, the Department of the Treasury (Treasury Department) and the IRS published comprehensive final regulations in the **Federal Register** (TD 8476, 58 FR 33510) on the arbitrage investment restrictions and related provisions for tax-exempt bonds under sections 103, 148, 149, and 150. Since that time, those final regulations have been amended in various limited respects, including

most recently in final regulations published in the **Federal Register** (TD 9777, 81 FR 46582) on July 18, 2016 (the regulations issued in 1993 and the various amendments thereto are collectively referred to as the Existing Regulations).

A notice of proposed rulemaking was published in the **Federal Register** (78 FR 56842; REG-148659-07) on September 16, 2013 (the 2013 Proposed Regulations), which, among other things, proposed to amend the definition of “issue price.” Subsequently, the Treasury Department and the IRS withdrew §1.148-1(f) of the 2013 Proposed Regulations regarding the definition of issue price and published another notice of proposed rulemaking in the **Federal Register** (80 FR 36301; REG-138526-14) on June 24, 2015, which re-proposed a definition of issue price (the 2015 Proposed Regulations). Comments were received and a public hearing was held on October 28, 2015. After consideration of all of the public comments, the Treasury Department and the IRS adopt the 2015 Proposed Regulations, with revisions, by this Treasury decision (the Final Regulations).

Summary of Comments and Explanation of Provisions

This section discusses the comments received from the public regarding the 2015 Proposed Regulations. The comments are available for public inspection at www.regulations.gov. This section also explains revisions made in the Final Regulations.

1. Introduction.

Under section 103, interest received by investors on eligible State and local bonds is exempt from Federal income tax. As a result, tax-exempt bonds tend to have lower interest rates than taxable obligations. Section 148 generally limits investment of

proceeds of tax-exempt bonds to investment yields that are not materially higher than the yield on the bond issue. Section 148 also generally requires that excess investment earnings be paid to the Federal Government at periodic intervals. For purposes of these arbitrage investment restrictions, section 148(h) provides that yield on an issue is to be determined on the basis of the issue price (within the meaning of sections 1273 and 1274). The reason for using issue price (rather than sales proceeds less the costs of issuance) to determine yield for purposes of section 148(h) is to ensure that issuers bear the costs of issuance, rather than recover these costs through arbitrage profits. See H. Rep. No. 99-426, at 517 (1985). The report of the Committee on Ways and Means states that the Committee believed that this requirement would encourage issuers to scrutinize costs of issuance more closely and would encourage better targeting of the federal subsidy associated with tax-exempt bonds. *Id.*, at 517-518. In general, the lower the issue price for bonds bearing a stated interest rate, the higher the yield. An issuer has an economic incentive to receive the highest price for bonds and to pay the lowest yield. This aligns with the purpose of the arbitrage restrictions, which is to minimize arbitrage investment benefits and remove incentives to issue more tax-exempt bonds, and thus to limit the federal revenue cost of the tax subsidy for tax-exempt bonds.

The issue price definition under the Existing Regulations generally follows the issue price definition used for computing original issue discount on debt instruments under sections 1273 and 1274, with certain modifications. The definition of issue price under the Existing Regulations provides generally that the issue price of bonds that are publicly offered is the first price at which a substantial amount of the bonds is sold to the

public. The Existing Regulations define a substantial amount to mean ten percent. Further, the Existing Regulations include a special rule that applies a reasonable expectations standard (rather than a standard based on actual sales) to determine, as of the sale date,¹ the issue price for bonds for which a bona fide public offering is made, based on reasonable expectations regarding the initial offering price. The issue prices of bonds with different payment and credit terms are determined separately. Tax-exempt bond issues often include bonds with different payment and credit terms that generally sell at different prices.

The special rule in the Existing Regulations that provides for the determination of issue price as of the sale date based on reasonable expectations about the initial public offering price aims, in part, to provide certainty that the bonds will qualify as tax-exempt bonds and meet State or local requirements for debt issuance. Generally, the sale date is the date when the syndicate or sole underwriter in contractual privity with the issuer signs the agreement to buy the bonds from the issuer and when the terms of the bond issue are set. In the municipal bond market, due largely to the serial maturity structure and, in many cases, an inability to sell a substantial amount of each of the different maturities of the bonds with different terms (for which issue price must be determined separately) by the sale date, issuers may have difficulties in establishing the issue price of all of the bonds included within an issue by the sale date, unless a special rule is available.

¹ Under §1.150-1(c)(6), the sale date of a bond is the first day on which there is a binding contract in writing for the sale or exchange of the bond. By comparison, under §1.150-1(b), the issue date for a bond is the date on which the issuer receives the purchase price in exchange for that bond, commonly referred to as the closing date or settlement date.

2. General Rule: Actual Sale of a Substantial Amount of Bonds.

Consistent with section 148(h), the 2015 Proposed Regulations proposed to retain the rule that issue price generally will be determined under the rules of sections 1273 and 1274. The 2015 Proposed Regulations also proposed a general rule similar to that in the regulations under section 1273 that the issue price of bonds issued for money is the first price at which a substantial amount of the bonds is sold to the public. The 2015 Proposed Regulations proposed to retain the rule in the Existing Regulations that ten percent is the measure of a substantial amount. The 2015 Proposed Regulations also proposed to retain the rule that the issue prices of bonds with different payment and credit terms are determined separately.

Commenters recommended adding an express rule to address the treatment of private placements (for example, bank loans), which in the municipal bond industry typically do not involve underwriters. Commenters also recommended clarifying that an issuer may use the general rule to determine issue price even if the issuer had sought to use the special rule based on the initial offering price to the public discussed in section 3 of this preamble. The Treasury Department and the IRS agree with these recommendations.

The Final Regulations retain the rules in the Existing Regulations and the general rule of the 2015 Proposed Regulations that, for bonds issued for money, the issue price is the first price at which a substantial amount of the bonds is sold to the public, and a substantial amount is ten percent. In addition, in response to comments, the Final Regulations expressly provide that, for a bond issued for money in a private placement to a single buyer that is not an underwriter or a related party (as defined in §1.150-1(b))

to an underwriter, the issue price of the bond is the price paid by that buyer. Further, the Final Regulations clarify that for bonds for which more than one rule for determining issue price is available, for example, the general rule and one of the special rules discussed in sections 3 and 4 of this preamble, an issuer may select the rule it will use to determine the issue price for the bonds at any time on or before the issue date of the bonds. On or before the issue date of the bonds, the issuer must identify the rule selected in its books and records maintained for the bonds.

A commenter suggested that a specific time on the sale date should be established as the proper time for determining issue price. The Treasury Department and the IRS understand that it has been a longstanding practice to determine issue price on the sale date without regard to a specific time and that it is unlikely for bonds to be sold to the public at different prices on that date. Thus, the imposition of a specific time deadline for such determination seems unnecessary and would add to the administrative burden. The Final Regulations do not adopt this comment.

3. Special Rule for Use of the Initial Offering Price to the Public.

The 2015 Proposed Regulations proposed a special rule that would allow an issuer to treat the initial offering price to the public as the issue price as of the sale date, provided certain requirements were met. That proposed special rule (referred to as the “alternative method” in the 2015 Proposed Regulations) proposed to require that the lead underwriter (or sole underwriter, if applicable) certify certain matters, including that no underwriter would sell bonds after the sale date and before the issue date at a price higher than the initial offering price except if the higher price was the result of a market change for the bonds after the sale date (for example, due to a change in market

interest rates), and that the lead underwriter provide the issuer with supporting documentation for the matters covered by the certifications, including a justification for any higher price based on a market change. (This proposed requirement for underwriters generally to hold the price at no higher than the initial offering price to the public until the issue date is sometimes referred to herein as the “hold-the-offering-price” requirement.)

Commenters favored a special rule to allow use of the initial offering price to the public to set the issue price as of the sale date. Numerous commenters, however, expressed concerns about various aspects of the eligibility requirements for this proposed special rule. One concern expressed by underwriters was that the requirement for the lead underwriter to provide certification as to the actions of the entire underwriting syndicate or selling group was overly broad. Instead, underwriters recommended allowing members of an underwriting syndicate or a selling group to agree individually to act in accordance with the specific matters required under the special rule. The Final Regulations adopt the comment that each underwriter is individually or severally responsible for its agreement (rather than jointly responsible with other underwriters).

Several commenters suggested that the hold-the-offering-price requirement would result in lower offering prices and should not be included in the special rule. One concern expressed related to the differing time periods between the sale date and the issue date for various issuers. One commenter recommended limiting the time period for holding the price to six business days after the sale date. Further, notwithstanding the potential flexibility in pricing afforded by the proposed market change exception to

the hold-the-offering-price requirement, commenters overwhelmingly objected to this exception as unworkable because of the absence of meaningful benchmarks for municipal bond prices. Commenters also expressed concern that use of this exception could lead to audit disputes over appropriate documentation to support such price changes.

Accordingly, the Final Regulations adopt a modified hold-the-offering-price requirement that requires underwriters to hold the price for offering and selling unsold bonds at a price that is no greater than the initial offering price to the public for a shorter time period that ends on the earlier of (1) the close of the date that is the fifth (5th) business day after the sale date or (2) the date on which the underwriters have sold a substantial amount of the bonds to the public. Further, in response to the overwhelming negative comments about the proposed market change exception to the proposed hold-the-offering-price requirement, the Final Regulations omit the market change exception.

The modified hold-the-offering-price requirement in the Final Regulations provides a standardized time period for application of the requirement to bonds regardless of the differing time periods among issuers between sales and closings of municipal bond issues. Further, the shorter time period for this requirement should reduce potential associated risks to underwriters and thereby limit the effects of this requirement on initial pricing to issuers and, at the same time, ensure that market pricing behavior is consistent with the initial offering price used for issue price determinations.

Two commenters suggested confirming that, for purposes of the hold-the-offering-price requirement, an underwriter may sell bonds to anyone at a price that is

lower (rather than higher) than the initial offering price to the public under this special rule. This special rule expressly provides for this result under the Final Regulations. One commenter sought clarification that underwriters may sell bonds to other underwriters at prices that are higher than the initial offering price to the public under this special rule. Sales to underwriters at such higher prices are inconsistent with a purpose of this special rule to use the initial offering price to the public as a proxy for the issuer's agreement with the underwriters about the maximum amount of underwriters' compensation that is reflected in setting the issue price. Thus, the Final Regulations clarify that underwriters may not sell the bonds at a price that is higher than the initial offering price to the public.

Several commenters recommended a different special rule that would base determinations of issue price on sales of an aggregate percentage of all of the bonds included within an issue, as distinguished from the bond-by-bond method required to determine issue price for bonds with different interest rates, maturities, credits, or payment terms under the Existing Regulations and the 2015 Proposed Regulations. Commenters recommended different percentages of sales of aggregate principal amounts of bonds within an issue to determine issue price, including 25 percent, 50 percent, and 65 percent.

Although a rule that would focus on actual sales of greater percentages of the aggregate principal amounts of bonds included within an issue to determine issue price has potential utility, the Treasury Department and the IRS have concerns about the comparability of the terms of unsold bonds with the terms of sold bonds, which would serve as a proxy for setting the issue price of the unsold bonds, and about the attendant

potential complexity to ensure appropriate comparability. Further, the Treasury Department and the IRS have concerns about selection of an appropriate percentage of aggregate sales for such a rule and whether issuers would be able to sell the required percentage of the aggregate principal amount of bonds within the issue. The public comments did not reflect any consensus on an appropriate percentage of aggregate sales for such a rule. In addition, several of the comments in favor of such a rule focused particularly on the need for a more workable rule for competitive sales. In response to this concern, the Final Regulations provide a simplified special rule for competitive sales, as described in section 4 of this preamble. Accordingly, the Final Regulations do not adopt a rule that would focus on actual sales of greater percentages of the aggregate principal amounts of bonds included within an issue.

In summary, the Final Regulations provide a special rule under which an issuer may treat the initial offering price to the public as the issue price of the bonds as of the sale date if: (1) The underwriters offered the bonds to the public at a specified initial offering price on or before the sale date, and the lead underwriter in the underwriting syndicate or selling group (or, if applicable, the sole underwriter) provides, on or before the issue date, a certification to that effect to the issuer, together with reasonable supporting documentation for that certification, such as a copy of the pricing wire or equivalent communication; and (2) each underwriter agrees in writing that it will neither offer nor sell the bonds to any person at a price that is higher than the initial offering price during the period starting on the sale date and ending on the earlier of the close of the fifth (5th) business day after the sale date, or the date on which the underwriters

have sold a substantial amount of the bonds to the public at a price that is no higher than the initial offering price to the public.

4. Special Rule for Competitive Sales.

Numerous commenters, including four States, strongly urged a streamlined special rule for competitive sales to allow the reasonably expected initial offering price to the public reflected in the winning bid in a competitive sale to establish the issue price without a hold-the-offering-price requirement or other restrictions. Commenters suggested that the public bidding process for pricing municipal bonds in competitive sales itself provides a sufficient basis to achieve the best pricing for issuers. The Treasury Department and the IRS recognize that competitive sales favor competition and price transparency that may result in better pricing for issuers. The Final Regulations adopt these comments and provide that, for bonds issued for money pursuant to an eligible competitive sale, an issuer may treat the reasonably expected initial offering price to the public of the bonds as the issue price of the bonds as of the sale date if the issuer obtains a certification from the winning bidder regarding the reasonably expected initial offering price to the public of the bonds upon which the price in the winning bid is based.

For purposes of this special rule, the Final Regulations define competitive sale to mean a sale of bonds by an issuer to an underwriter that is the winning bidder in a bidding process in which the issuer offers the bonds for sale to underwriters at specified written terms and that meets the following requirements: (1) The issuer disseminates the notice of sale to potential underwriters in a manner reasonably designed to reach potential underwriters; (2) all bidders have an equal opportunity to bid; (3) the issuer

receives bids from at least three underwriters of municipal bonds who have established industry reputations for underwriting new issuances of municipal bonds; and (4) the issuer awards the sale to the bidder who offers the highest price (or lowest interest cost).

5. Definitions.

The 2015 Proposed Regulations proposed to define the term “public” for purposes of determining the issue price of tax-exempt bonds to mean any person other than an underwriter or a related party to an underwriter. Several commenters recommended expanding the definition of public to include related parties to underwriters. This recommended change would allow various affiliates of underwriters, such as entities involved in proprietary trading, to qualify as members of the public for purposes of determining issue price. The Final Regulations do not adopt this comment. The Final Regulations retain this related party restriction on the definition of the public as a safeguard to protect against potential abuse.

The 2015 Proposed Regulations proposed to define “underwriter” to include: (1) Any person that contractually agrees to participate in the initial sale of the bonds to the public by entering into a contract with the issuer or into a contract with a lead underwriter to form an underwriting syndicate and (2) any person that, on or before the sale date, directly or indirectly enters into a contract or other arrangement with any of the foregoing to sell the bonds. Numerous commenters expressed significant concern that the phrase “other arrangement” in the definition of underwriter was vague and unworkable. One commenter asked if distribution arrangements (for example, a retail distribution contract between a member of an underwriting syndicate or selling group

and another dealer that is not in the syndicate or selling group) were included. Another commenter suggested changes to clarify that a contract to sell the bonds be limited to a contract with respect to the initial sale of the bonds to the public. In response to these comments, the Final Regulations omit the phrase “or other arrangement” from the definition of underwriter. The Final Regulations also clarify that covered agreements must relate to the initial sale of the bonds to the public and that these agreements include retail distribution agreements.

6. Standard for Reliance on Certifications and Consequences of Violations.

The 2015 Proposed Regulations proposed a standard that would limit an issuer’s ability to rely on certifications from underwriters to circumstances in which an issuer did not know or have reason to know, after exercising due diligence, that the certifications were false. Several commenters expressed concerns about this proposed standard for reliance on certifications. One commenter expressed particular concern that the proposed standard appeared to be higher than or different from the general due diligence standard for determining reasonable expectations that bonds are not arbitrage bonds under §1.148-2(b) of the Existing Regulations. The existing definition of reasonable expectations, found in §1.148-1(b) of the Existing Regulations, treats an issuer’s expectations or actions as reasonable only if a prudent person in the same circumstances as the issuer would have those same expectations or take those same actions, based on all the objective facts and circumstances. One commenter also sought confirmation that issuers could rely on certifications from underwriters without independent verification.

In response to the comments, the Final Regulations omit the proposed special standard for reliance on underwriters' certifications. Instead, the existing due diligence standard under the Existing Regulations for reasonable expectations or reasonableness will apply to any certification under the Final Regulations. For example, this existing due diligence standard will apply under the special rule on competitive sales to an issuer's reliance on a certification from the winning bidder regarding the reasonably expected initial offering price to the public of the bonds upon which the price in the winning bid is based.

Several commenters urged providing conclusive legal certainty for issue price determinations as of the sale date based on receipt of required underwriter certifications without regard to whether such certifications subsequently proved to be false. Although the Final Regulations generally will allow issuers to establish the issue price as of the sale date, the Final Regulations do not adopt this comment. Accordingly, a failure to meet a specific eligibility requirement of a rule for determining issue price, such as an underwriter's breach of its hold-the-offering-price agreement under the special rule for use of initial offering price, will result in a failure to establish issue price under that rule and a redetermination of issue price under a different rule. The potential invalidation of an issue price determination is important to ensure compliance with the arbitrage restrictions and the legal availability of penalties against underwriters for false statements. A false statement by an underwriter in a certification or in the agreement among underwriters under one of these special rules may result in a penalty against the underwriter under section 6700, depending on the facts and circumstances.

In accordance with section 6001, the issuer must maintain reasonable documentation in its books and records to support its issue price determinations. In addition, the Final Regulations require that the issuer obtain from the underwriter certain certifications and other reasonable supporting documentation such as a pricing wire to establish its issue price determination under a specific rule in the Final Regulations. A certification from the underwriter of the first price at which ten percent of the bonds were sold to the public is an example of reasonable supporting documentation to establish the issue price of the bonds under the general rule in the Final Regulations.

7. Other Comments

A commenter requested a special rule under section 148 to determine issue price in a debt-for-debt exchange, including an exchange resulting from a significant modification under §1.1001-3. Under the special rule, an issuer would have the option to use a tax-exempt bond's stated principal amount as the issue price rather than the issue price that otherwise would apply under section 1273 or 1274. The commenter requested the rule because, in the commenter's experience, the stated interest rate on a tax-exempt bond issued in a debt-for-debt exchange was generally less than the adjusted applicable Federal rate (AAFR) used under section 1288 to determine whether the bond has adequate stated interest for purposes of section 1274. In this situation, the issue price of the bond would be less than the bond's stated principal amount, resulting in an arbitrage yield that is higher than it otherwise would be if the bond were treated as issued for an amount equal to the bond's stated principal amount. The Final Regulations do not include such a rule because, since the date of the commenter's request, the method to determine the AAFR has been modified in TD 9763, 81 FR

24482 (April 26, 2016). As a result of this modification, it is more likely that the issue price of a tax-exempt bond issued in a debt-for-debt exchange will be the bond's stated principal amount under section 1273 or 1274 (for example, because the AAFR will not be greater than the corresponding applicable Federal rate for taxable bonds, as it was in certain years before the modification).

In addition, some commenters recommended allowing the use of issue price as defined for arbitrage purposes in applying various limitations for other tax-exempt bond purposes, such as those based on principal amounts, face amounts, and sale proceeds. The Final Regulations do not adopt this recommendation because it raises issues that are beyond the scope of the 2015 Proposed Regulations, and the recommended extension of the application of the definition of issue price beyond arbitrage purposes appropriately warrants a separate opportunity for public comment. The Treasury Department and the IRS, however, expect to consider this recommendation in connection with future guidance.

Applicability Date

The Final Regulations apply to bonds that are sold on or after **[INSERT DATE 180 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Special Analyses

Certain IRS regulations, including these Final Regulations, are exempt from the requirements of Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory impact assessment is not required.

It is hereby certified that these Final Regulations will not have a significant economic impact on a substantial number of small entities. This certification is based

generally on the fact that any effect on small entities by these rules generally flows from section 148 of the Code. Section 148(h) of the Code requires the yield on an issue of bonds to be determined on the basis of issue price (within the meaning of sections 1273 and 1274). Under section 1273(b), the issue price is the first price at which a substantial amount of the bonds is sold to the public. Section 1.148-1(f)(2) of the Final Regulations gives effect to the statute by requiring the issuer to (1) obtain certain documentation from the underwriter, which is the party that sells the bonds to the public, to support the issuer's determination of issue price and (2) indicate in its books and records the rule used by the issuer to determine issue price. This information will be used to support the issue price of the bonds for audit and other purposes. Any economic impact of obtaining this information is minimal because most of the information already is provided to issuers by the underwriters under existing industry practices. Accordingly, these changes do not add to the impact on small entities imposed by the statutory provision. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required.

Pursuant to section 7805(f) of the Code, the 2015 Proposed Regulations preceding these Final Regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

Drafting Information

The principal authors of these regulations are Johanna Som de Cerff and Lewis Bell, Office of Associate Chief Counsel (Financial Institutions and Products), IRS.

However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.148-0(c) is amended by adding entries for §§1.148-1(f) and 1.148-11(m) to read as follows:

§1.148-0 Scope and table of contents.

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(c) * * *

§1.148-1 Definitions and elections.

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- (f) Definition of issue price.
- (1) In general.
- (2) Bonds issued for money.
- (3) Definitions.
- (4) Other special rules.

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§1.148-11 Effective/applicability dates.

* * * * *

(m) Definition of issue price.

Par. 3. Section 1.148-1 is amended by revising the definition of “Issue price” in paragraph (b) and adding paragraph (f) to read as follows:

§1.148-1 Definitions and elections.

* * * * *

(b) * * *

Issue price means issue price as defined in paragraph (f) of this section.

* * * * *

(f) Definition of issue price--(1) In general. Except as otherwise provided in this paragraph (f), “issue price” is defined in sections 1273 and 1274 and the regulations under those sections.

(2) Bonds issued for money--(i) General rule. Except as otherwise provided in this paragraph (f)(2), the issue price of bonds issued for money is the first price at which a substantial amount of the bonds is sold to the public. If a bond is issued for money in a private placement to a single buyer that is not an underwriter or a related party (as defined in §1.150-1(b)) to an underwriter, the issue price of the bond is the price paid by that buyer. Issue price is not reduced by any issuance costs (as defined in §1.150-1(b)).

(ii) Special rule for use of initial offering price to the public. The issuer may treat the initial offering price to the public as of the sale date as the issue price of the bonds if the requirements of paragraphs (f)(2)(ii)(A) and (B) of this section are met.

(A) The underwriters offered the bonds to the public for purchase at a specified initial offering price on or before the sale date, and the lead underwriter in the underwriting syndicate or selling group (or, if applicable, the sole underwriter) provides,

on or before the issue date, a certification to that effect to the issuer, together with reasonable supporting documentation for that certification, such as a copy of the pricing wire or equivalent communication.

(B) Each underwriter agrees in writing that it will neither offer nor sell the bonds to any person at a price that is higher than the initial offering price to the public during the period starting on the sale date and ending on the earlier of the following:

(1) The close of the fifth (5th) business day after the sale date; or

(2) The date on which the underwriters have sold a substantial amount of the bonds to the public at a price that is no higher than the initial offering price to the public.

(iii) Special rule for competitive sales. For bonds issued for money in a competitive sale, an issuer may treat the reasonably expected initial offering price to the public as of the sale date as the issue price of the bonds if the issuer obtains from the winning bidder a certification of the bonds' reasonably expected initial offering price to the public as of the sale date upon which the price in the winning bid is based.

(iv) Choice of rule for determining issue price. If more than one rule for determining the issue price of the bonds is available under this paragraph (f)(2), at any time on or before the issue date, the issuer may select the rule it will use to determine the issue price of the bonds. On or before the issue date of the bonds, the issuer must identify the rule selected in its books and records maintained for the bonds.

(3) Definitions. For purposes of this paragraph (f), the following definitions apply:

(i) Competitive sale means a sale of bonds by an issuer to an underwriter that is the winning bidder in a bidding process in which the issuer offers the bonds for sale to underwriters at specified written terms, if that process meets the following requirements:

(A) The issuer disseminates the notice of sale to potential underwriters in a manner that is reasonably designed to reach potential underwriters (for example, through electronic communication that is widely circulated to potential underwriters by a recognized publisher of municipal bond offering documents or by posting on an Internet-based website or other electronic medium that is regularly used for such purpose and is widely available to potential underwriters);

(B) All bidders have an equal opportunity to bid (within the meaning of §1.148-5(d)(6)(iii)(A)(6));

(C) The issuer receives bids from at least three underwriters of municipal bonds who have established industry reputations for underwriting new issuances of municipal bonds; and

(D) The issuer awards the sale to the bidder who submits a firm offer to purchase the bonds at the highest price (or lowest interest cost).

(ii) Public means any person (as defined in section 7701(a)(1)) other than an underwriter or a related party (as defined in §1.150-1(b)) to an underwriter.

(iii) Underwriter means:

(A) Any person (as defined in section 7701(a)(1)) that agrees pursuant to a written contract with the issuer (or with the lead underwriter to form an underwriting syndicate) to participate in the initial sale of the bonds to the public; and

(B) Any person that agrees pursuant to a written contract directly or indirectly with a person described in paragraph (f)(3)(iii)(A) of this section to participate in the initial sale of the bonds to the public (for example, a retail distribution agreement

between a national lead underwriter and a regional firm under which the regional firm participates in the initial sale of the bonds to the public).

(4) Other special rules. For purposes of this paragraph (f), the following special rules apply:

(i) Separate determinations. The issue price of bonds in an issue that do not have the same credit and payment terms is determined separately. The issuer need not apply the same rule to determine issue price for all of the bonds in the issue.

(ii) Substantial amount. Ten percent is a substantial amount.

(iii) Bonds issued for property. If a bond is issued for property, the adjusted applicable Federal rate, as determined under section 1288 and §1.1288-1, is used in lieu of the applicable Federal rate to determine the bond's issue price under section 1274.

Par. 4. Section 1.148-11 is amended by adding paragraph (m) to read as follows:

§1.148-11 Effective/applicability dates.

* * * * *

(m) Definition of issue price. The definition of issue price in §1.148-1(b) and (f) applies to bonds that are sold on or after **[INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

John Dalrymple,
Deputy Commissioner for Services and Enforcement.

Approved: November 22, 2016.

Mark J. Mazur,
Assistant Secretary of the Treasury for Tax Policy.

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